No. 83-2157

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CRANE NECK ASSOCIATION, INC.; ARTHUR L. DOUGLAS, JR.; CATHERINE CHILDS; EVERSLEY CHILDS ODGEN; MARGHERITA A. FIDAO; CHARLES H. COPELAND; ARTHUR WEEKS and RUTH WEEKS; KEVIN HANLON and JO ANN HANLON; MARION HOMIRE; HIROSHI TAKAHASHI and YOSHIKO TAKAHASHI; PHILIP ERHORN; LAWRENCE FORSDICK and NANCY FORSDICK; CHARLES A. FORSDICK; ARTHUR BELDER; ARTHUR R. FORSDICK; RENATTE HAKIM-ELAHI; ROBERT GORDON and IDA GORDON; H. WILLARD GRAY and BARBARA GRAY; HARVEY KRAMER; CHARLES WURSTER and EVA WURSTER; SHERRI ANN TISCH; H. TREBLING BURNARD and MARGARET BURNARD; ARTHUR AUFSES and HARRIET AUFSES; JANE PERKINS; WILLIAM MILHAVEN and BARBARA MILHAVEN; DOROTHY GRAF; BRUCE SULLIVAN and MARGARET SULLIVAN; ANNA L. HARTZELL; MAXIME C. FIDAO; WALTER EICHACKER and JANET EICHACKER; YANG S. LU and GRACE LU,

Appellants,

—against—

NYC/LONG ISLAND COUNTY SERVICES GROUP and JONATHAN POOL and BERNARD GROFMAN, and NEW YORK STATE DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Appellees.

MEMORANDUM OF APPELLANTS IN OPPOSITION TO THE APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

PAGE

STATEMENT 1

I—The judgment of the Court of Appeals is final for purposes of this Court's jurisdiction 1

II—The judgment of the New York Court of Appeals rests squarely upon rejection of the contract clause claims .. 3

III—The Fifth and Fourteenth Amendment claims are preserved for this appeal 4

IV—There are substantial federal questions presented by this appeal 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Arrow Louver & Damper Corp. v. *Newsday, Inc.*, 86 A.D. 2d 513, 445 N.Y.S.2d 747 (1st Dep't 1982) 2

Columbia Railway v. *South Carolina*, 261 U.S. 236, 43 S.Ct. 306 (1923) 4

Cox Broadcasting Corporation v. *Cohn*, 420 U.S. 469, 95 S.Ct. 1029 (1978) 2

Lanza v. *Wagner*, 11 N.Y.2d 317 (1962) 2

Somerset Railroad Corporation v. *Graham*, 89 A.D.2d 819, 453 N.Y.S.2d 527 (4th Dep't 1982) 2

Syracuse Savings Bank v. *Town of DeWitt*, 56 N.Y.2d 671 (1982) 2

Veix v. *Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 60 S.Ct. 792 (1940) 6

Welsch v. *Goswick*, 130 Cal. App. 3d 398 (1982) 8

Constitutional Provisions, Federal and State Statutes:

Fifth Amendment, United States Constitution 4, 5

Fourteenth Amendment, United States Constitution 4, 5

N.Y. Constitution, Art. 6 § 3 1

28 U.S.C. § 1257 2

New York *Civil Practice Law and Rules* (McKinney 1978):

§ 5524 2

§§ 5601, 5611 1

New York *Mental Hygiene Law* (McKinney 1978):

Section 41.34 8

Section 41.34(f) 3, 4

Statement

Appellants Crane Neck Association, Inc., *et al.*, submit this memorandum of law in opposition to the separate motions of appellees NYC/Long Island County Services Group and New York State Department of Mental Retardation and Developmental Disabilities (the "State Appellees") and Jonathan Pool and Bernard Grofman ("Pool-Grofman") to dismiss or affirm.

I

The judgment of the Court of Appeals is final for purposes of this Court's jurisdiction.

The facts are not accurately set forth by the Appellees in their motion, who incorrectly state that the Appellate Division of the New York Supreme Court dismissed the complaint only insofar as it sought injunctive relief (State Motion, p. 5; Pool-Grofman Motion, p. 12). On the contrary, that Court's decision (J.S. 11a-25a)[1] and judgment made it clear that the complaint was dismissed in its entirety. The Court of Appeals correctly noted (J.S. 27a) that the Appellate Division had granted total relief to the Appellees:

> The Appellate Division . . . dismissed the complaint, determining that the facility could be considered a single-family dwelling consistent [with] the restrictive covenant, and that in any event the covenant could not be enforced to prevent the residence as a matter of public policy.

Under the State Constitution and statutes (N.Y. Constitution, Art. 6 §3 [McKinney 1969]; *Civil Practice Law and Rules* §§5601, 5611 [McKinney 1978]) the Court of Appeals possessed jurisdiction only because the Appellate Division determination was final and disposed "of all of the issues in the action." Significantly, Appellees failed to move to dismiss the appeal in the Court of Appeals for lack of jurisdiction, and the Court as-

[1]The Jurisdictional Statement will hereinafter be referred to as "J.S."

sumed jurisdiction and decided the matter on the merits. That Court made it clear that no portion of Appellants' case remained following its ruling. In footnote 1 (J.S. 32a), it stated:

> in view of our holding, there is no need to reach the issue of waiver of the restrictive covenant, or what value if any it might have.

Thus, the Court affirmed the order of the Appellate Division without remanding any portion of the case for trial.[2] Moreover, at J.S. 41a, the Court expressly held that "Appellants' private contract rights may not override state policy." A remand for trial would have been without purpose in light of the Court of Appeals' holding, since an award of damages against the State would override state policy.

Thus, the Court of Appeals judgment disposed of all of the issues in the action, and was a final judgment within the meaning of 28 U.S.C. §1257. It is unnecessary to perform an analysis based upon *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 95 S.Ct. 1029 (1978).

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[2]In New York, complaints in declaratory judgment actions are not dismissed but instead the court declares the parties' rights. *Syracuse Savings Bank* v. *Town of DeWitt*, 56 N.Y.2d 671 (1982); *Lanza* v. *Wagner*, 11 N.Y.2d 317 (1962); *Arrow Louver & Damper Corp.* v. *Newsday, Inc.*, 86 A.D.2d 513, 445 N.Y.S.2d 747 (1st Dep't 1982); *Somerset Railroad Corporation* v. *Graham*, 89 A.D.2d 819, 453 N.Y.S.2d 527 (4th Dep't 1982). Hence, in this case the remand pursuant to CPLR § 5524 did not signify further proceedings but was for the purpose of the entry of the Court of Appeals judgment as the judgment of the trial court declaring the rights of the parties. (This was later done.) None of the issues listed by Pool and Grofman (Pool-Grofman Motion, pp. 12-14) survived the Court of Appeals judgment. The Court of Appeals recognized in footnote 1 that, had it not found enforcement of the covenant to be barred, it would have been necessary to reach the issue of "what value if any [the covenant] might have."

II

The judgment of the New York Court of Appeals rests squarely upon rejection of the contract clause claims.

The State Appellees (State Motion, p. 7) argue that the Court of Appeals ruling is "at most" alternatively based upon a holding that Section 41.34(f) of New York *Mental Hygiene Law* applies to restrictive covenants, and that it is primarily based upon the principle that equitable relief will not lie where it would contravene public policy. Appellees Pool and Grofman make no such concession (Pool-Grofman Motion, p. 14).

The Court of Appeals opinion [conceded by State Appellees (Motion to Dismiss or Affirm, p. 7, n.) to be "not totally free from doubt"] makes it clear beyond cavil that the Court regarded Section 41.34(f) to be specifically applicable to private restrictive covenants. The Court held that the statutory language referring to "local laws and ordinances" was "not a deliberate substantive limitation by the Legislature" and that

> the Legislature did not enact subdivision (f) to erase the impediment resulting from single family requirements found in laws and ordinances while leaving it intact in private covenants, and that the subdivision applies to such deed restrictions as well. (J.S. 37a)

The Court described the legislative intent "to remove barriers based on 'family' restrictions, whether contained in local laws, ordinances or private covenants." (J.S. 37a) At J.S. 39a, the Court held that the statute (must be read with the legislative goal in mind so that . . . gaps in the law may be resolved in accordance with the legislative scheme." At J.S. 40a, the Court held that, despite the language of the Contract Clause of the U.S. Constitution,

> the State's interest in protecting the general good of the public through social welfare legislation is paramount to

> the interests of parties under private contracts, *and the State may impair such contracts by subsequent legislation or regulation* so long as it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are reasonable and appropriate to effectuate that purpose. (Emphasis added.)

Finally, at J.S. 40a, n.5, the Court pointed out that "where a court order is based on and gives force or effect to a legislative enactment, *there is an impairment within the terms of the contract clause,*" citing *Columbia Railway* v. *South Carolina,* 261 U.S. 236, 244-245, 43 S.Ct. 306 (1923) (emphasis added).

It is thus clear that the judgment below rests squarely upon the holding that the State had the right to override private contract rights under the circumstances presented by this case, and did so by enacting Section 41.34(f). The court relied upon "longstanding public policy" merely as legislative history, to aid in the construction of Section 41.34(f). The statute was treated as an expression and implementation of state policy. The judgment below inextricably linked the construction of the statute with the application of public policy, so that it is not possible, as the Appellees suggest, to separate the bases of the lower court's holding and conclude that there is an adequate non-federal basis for the judgment appealed from.

III

The Fifth and Fourteenth Amendment claims are preserved for this appeal.

Based upon their erroneous assumption that Appellants' damage action was preserved, the Appellees argue that the Fifth and Fourteenth Amendment claims have not been preserved for this appeal. As noted, *supra,* the New York courts have dismissed Appellants' complaint in its entirety. Even assuming *arguendo*

that two causes of action for money damages had been preserved, no viability would remain in those causes of action in light of the Court of Appeals' flat pronouncement that "Appellants' private contract rights may not override state policy." No damage award could stand consistently with that holding. Thus, Appellants' rights to declaratory and injunctive relief, and to damages, have been rejected by the state courts and the Fifth and Fourteenth Amendment claims are preserved.

IV

There are substantial federal questions presented by this appeal.

The Appellees argue that no substantial federal question is presented because Appellants never possessed a contract right "to impose upon a court of equity the mechanical obligation to grant an injunction for every violation of their covenant." (State Motion, p. 9; see Pool-Grofman Motion, p. 37). Thus, they conclude, the denial of injunctive relief did not significantly impair Appellants' contract rights. This argument erroneously assumes that the impairment of Appellants' contract rights is to be measured only by the New York courts' refusal to grant an injunction. As previously noted, however, Appellants' complaint was in all respects dismissed, and thus Appellants lost any opportunity to seek money damages as well as injunctive or declaratory relief. Contrary to the State Appellees' gratuitous conclusion that "any expectation on the part of the appellants that their covenant could be perpetually enforced without regard for subsequent legislation advancing a legitimate public purpose would not be reasonable," (State Motion, p. 11) we submit that homeowners who purchase their residences in reliance upon contractual covenants assuring a continuity of single-family use have every right to expect that *some* relief will be afforded them in the event of future breach of their contract rights. Deprivation of all relief surely constitutes a substantial contract impairment, particularly

when it is considered that purchase of a home is the single largest legal transaction in the lifetime of most people.

Traditional equitable principles which prevent the making of "an inequitable decree" do not avail the Appellees, not only because all relief—not merely equitable—was denied, but for the additional reason that reference to general principles of equity can never afford to a contracting party notice as to what subsequent circumstances could arise which would cause a court to decide that his attempt to enforce his contract rights would be "inequitable." It is the substantive development of the law—[and, in particular whether regulation has previously occurred in the specific area, *Veix* v. *Sixth Ward Building & Loan Association*, 310 U.S. 32, 60 S.Ct. 792 (1940)]—which shapes a contracting party's expectations with regard to whether the subject matter of his contract is likely to be regulated by the State in the future, and, hence, whether enforcement of his contract rights might be deemed "inequitable" by reason of conflict with State policy. In the absence of any indication that the subject matter of the restrictive covenant at bar would be so regulated, the Appellants had no reason to expect that regulation would occur in this area or that the State would subsequently enact legislation overriding private restrictive covenants for the purpose of establishing community residences in a single-family residential area.[3]

The Appellees also question the substantiality of the impairment of Appellants' contract rights on the ground that the challenged statute "provides for the protection of the residential character of neighborhoods." (State Motion, p. 11; see Pool-Grofman Motion, pp. 37-38). What Appellees overlook is that Appellants were not parties to the prior administrative and judicial proceedings involving the government of the Incorporated Vil-

[3]The argument by appellees' Pool and Grofman (p. 33) that a property owner can reasonably expect no greater protection from a deed restriction than he can from a local zoning ordinance misses the point. Restrictive covenants are entered into for the very purpose of protecting property against the vagaries of zoning action by municipal bodies peculiarly susceptible to political pressures.

lage of Old Field, and were in no manner bound by the result. Thus, the administrative determination by the Appellee New York State Department of Mental Retardation & Developmental Disabilities that the nature and character of the area would not be "substantially altered" by establishment of a community residence—even if it were deemed to be the equivalent of a finding that Appellants' contract rights were insubstantial (which does not necessarily follow)—cannot bind the Appellants.

Appellees argue that there is no substantial federal question presented by this appeal because the statute and public policy upheld by the Court of Appeals implement important state and federal policies in a reasonable manner.[4] They note that the legislatures of 21 states have favored establishment of community residential facilities for the developmental disabled (Pool-Grofman Motion, p. 51, n. 10). They also claim, relying only upon the State Appellees' own statistics, that there are an "estimated 119,000 to 300,000 New York residents who are developmentally disabled" and "fewer than one-half of the developmentally disabled persons who are in need of community residence places have them." (Pool-Grofman Motion, pp. 43-44).

Without commenting on the accuracy of the State's figures (which do not appear in the record of this litigation), the significant legal question is whether community residence legislation can retroactively override contract rights of property owners as embodied in restrictive covenants. As noted by Appellees Pool and Grofman, "the Arizona and California legislatures were concerned with the retroactive application of their statutes" (Pool-Grofman Motion, p. 52, n. 10), and California's legislature expressly declined to apply its statute to deed and other contractual restrictions imposed prior to the enactment of the statute. A California court has avoided the prohibition of the statute

[4]Neither group of Appellees have attempted to show why it is necessary or reasonable for New York, in furtherance of its deinstitutionalization program, to acquire property encumbered by private covenants, since the number of areas limited to single family use by deed restrictions is small (J.S. 13-14).

by declaring a community residence for six or fewer adults to be the equivalent of a single-family dwelling. *Welsch* v. *Goswick*, 130 Cal. App. 3d 398 (1982). The New York Court of Appeals in this case squarely addressed the constitutional issue, expressly applied Section 41.34 of the *Mental Hygiene Law* retroactively, and held that the community residence in question was not a single-family residence and violated the covenant proscribing uses other than single-family uses. The sharp conflict between the manner in which New York and California have dealt with the issue of retroactivity underlines the widespread interest in this issue and provides additional reason for the Court to hear and determine this case. It hardly supports the proposition that no substantial federal question is presented. Nor is that proposition supported by the Appellees' delineation (Pool-Grofman Motion, pp. 12-14) of the issues allegedly remaining in the case: as they so aptly point out, there has never been a trial of these issues—yet they now ask this Court to conclude without such a trial that Appellants possess no substantial federal rights!

CONCLUSION

The motions to dismiss or affirm should be denied and probable jurisdiction noted.

Dated, Melville, New York
August 28, 1984

Respectfully submitted,

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